Supreme Court, U.S.
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86-820

CASE NO. _____

In The Supreme Court of the United States

OCTOBER TERM, 1986

JOHN HIMMILRIGHT

Petitioner,

v.

CURTIS FOULKS, JR.

Respondent.

ON PEITION FOR WRIT OF CERTIORAIR TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where findings of liability and awards of damages are unsupported by any evidence, should the findings be set aside as clearly erroneous?

2. Can a court find racial discrimination in hiring where the plaintiff was hired to the job for which he applied; where he failed to qualify for a higher level job; and where no opening existed at the higher level?

3. Where the plaintiff has established a prima facia case of a single instance of discriminatory treatment and the case has been rebutted, does the plaintiff have the burden of discrediting the explanation?

4. Can damages be awarded where there has been no showing of injury?

5. Can a defendant in a civil rights action be held liable for damages where it has neither been alleged nor proven that he was personally involved in the alleged deprivation?

6. Does a judicially appealed decision of an administrative agency rejecting a claim of discriminatory hiring have preclusive effect in the federal courts?

7. Does a federal court have jurisdiction to decide a claim brought against a dead man where there has been no substitution and no claim has been perfected against the estate?

PARTIES

The petitioner is John Himmilright, a former probation officer employed by the Ohio Adult Authority.

The respondent is Curtis Foulks, Jr.

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DECISION BELOW

The August 11, 1986 decision of the United States Court of Appeals in case no. 85-3725 affirming in part and reversing in part the district court judgment is unreported. The August 8, 1985 decision of the United States District Court for the Northern District of Ohio, Western division in case no. C76-57 is unreported. The United States Court of appeals decision of August 4, 1983 in case nos. 81-3315 and 81-3316 reversing and remanding the judgment of the district court is reported as *Foulks v. Ohio Department of Rehabilitation and Correction,* 713 F.2d 1229 (6th Cir. 1983). The judgments of August 13, 1980 and April 17, 1981 and the opinions of August 18, 1980 and April 27, 1981 of the district court are unreported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit affirming in part and reversing in part the judgment of the district court was entered in August 11, 1986. Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1981:

Equal rights under the law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalities, taxes, licenses, and exactions of every kind, and to no other.

and Rule 52 (a) Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

This action was commenced by the filing of complaint in the United States District Court for the Northern District of Ohio on February 20, 1976. The respondent, Curtis Foulks, Jr., (Foulks), a former parole and probation officer, alleged violations of 42 U.S.C. Sections 1981,1983 and 1985 (3). The plaintiff had named 29 defendants including the petitioner, John Himmilright (Himmilright), Morris DeForge (DeForge) and the Ohio Adult Parole Authority (APA). Foulks claimed that he had been the victim of racial discrimination in every aspect

of his employment including hiring, training, lay-off, assignments and his relationships with other employees and supervisors.

The case was tried to the court in February, 1980. The claims against 18 defendants and the Section 1983 claims were dismissed before trial. At the close of the plaintiff's case, the conspiracy claims brought under Section 1985(3) and the claims against 7 defendants were dismissed. Himmilright and DeForge did not testify. Himmilright had resigned from the APA and could not be located. DeForge had suffered a massive stroke.

An opinion and order were filed on August 12, 1980 (A-27) and a final judgment was entered on April 27, 1981 (A-23). It was found that the APA had hired Foulks as a Parole Officer I (PO I) and that he should have been hired as a Parole Officer II (PO II). The APA was ordered to pay $2,279.35 in damages based on the pay differential and the salary lost during a seven week lay-off. This finding was made dispite the fact that Foulks had not prevailed on the same claim before the Ohio Civil Rights Commission (OCRC) and despite the fact that Foulks had failed to establish a *prima facia* case. The Court stated at the end of the trial:

> THE COURT: I will make one tentative finding of fact that may shorten what you have to say.
>
> The Court is going to find no racial discrimination in the hiring process at the Parole Officer I level, for several reasons.
>
> At that point, unless you count the student teaching, Mr. Foulks did not have the required one year experience, and I don't think he should be credited with the student teaching, simply because he was given credit for that in obtaining his degree and that was a qualification that the student teaching was necessary for.
>
> Furthermore, there is no evidence that there was a P.O. II availability at that time, nor were

> there funds available to fund his hire at the P.O. II level, and the presumption is otherwise simply because six months later the department ran out of money and had to terminate some employees temporarily. (T.551)

It was also found that APA officials had limited Foulks' work on his master's degree and had criticized him because he lived outside his county of employment. The Court also found that Foulks had been misdirected to an employment examination and prevented from finishing a second test by unknown persons. DeForge was held to have repeatedly called Foulks "that black fox" and "nigger". Himmilright was found to have made negative comments about Foulks, in March, 1973, in response to an inquiry by a prospective employer, the Lucas County Probation Department.

Mr. Foulks testified that he had never heard DeForge use the word "nigger"; there was no evidence that DeForge had ever called Foulks a "nigger". Foulks testified that he had no idea of the number of reports rewritten by other parole officers; other officers testified that they had been required to rewrite reports and that DeForge treated all his subordinates in a harsh manner. Several APA officials agreed with Himmilright's opinion of Foulks. Foulks failed to establish that Himmilright had caused an injury; Foulks was hired by the Lucas County Probation Department a few days after the comments were made.

The Court treated the damages arising from the above mentioned findings in two sentenses:

> The actual damages for the discrimination, humiliation, and interference suffered by the plaintiff are more difficult to ascertain. Accordingly, the Court will award $2,279.35 as additional

> damages, resulting in a total verdict for the plaintiff of $4,558.70.

(A-23)

The Court also awarded $4,764.29 in attorney's fees. The awards were made jointly and severally against the APA, DeForge and Himmilright.

An appeal and cross appeal were filed in May, 1981. During the pendancy of the appeal, DeForge died. A suggestion of death was filed by DeForge's estate on October 15, 1982. No claim was perfected against DeForge's estate and no substitution was made for DeForge.

The United States Court of Appeals reversed and remanded the district court's judgment on August 4, 1983. The decision was reported as *Foulks v. Ohio Department of Rehabilitation and Correction,* 713 F.2d 1229 (6th Cir. 1983) (A-7). The District Court was ordered to dismiss the action against the APA; to re-examine Himmilright's and DeForge's acts and determine if they had violated Section 1981; to determine the extent of injury done by each act; to apportion the damages, if any, to the injuries; and to explain why the defendants were being held jointly and severally liable.

The order was ignored by the District Court. The Court did not re-examine the acts; it made no determination based on Section 1981; no attempt was made to ascertain injuries; and there was no explanation for the defendants' joint and several liability. Instead, the Court, in it's order of August 14, 1985 (A-3), shifted the responsibility for Foulks' hiring from the APA to DeForge. The APA was found to be immune from damages, but it was ordered to pay $4,764.29 in attorney's fees. The findings against the APA and unknown persons of interference with the plaintiff's education and employment tests do not appear in the second opinion. The finding against the APA involving criticism of Foulks' abode has vanished. Two new findings have appeared. The Court has found that DeForge called Foulks "Dark Gable" and told Foulks that his

daughter had been raped by a black man. The finding against Himmilright remained largely unchanged except that it was found to be "tantamount to liable". DeForge and Himmilright were again each found to be liable for the acts of the other. Since DeForge was dead, Himmilright is now liable for the exact amount of damages found in the first opinion, $4,558.70.

A second notice of appeal was filed in September 4, 1985. The appeal was decided in August 11, 1986 (A-1). The award of attorney's fees against the APA was reversed. The award of damages against Himmilright was upheld.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I. The Decisions Of The Court Of Appeals And The District Court Are In Direct Conflict With Rule 52 Of The Federal Rules Of Civil Procedure And So Far Depart From The Accepted And Usual Course Of Judicial Proceedings As To Call For This Court's Power Of Supervision.

The Court of Appeals' decision and the Disctict Court's decision are in direct conflict with Rule 52 of the Federal Rules of Civil Procedure. Rule 52(a) contains a clear and unambiguous statement that findings of fact must be set aside if they are determined to be clearly erroneous; a finding must be set aside if it is against the clear weight of the evidence. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Grubb v. W.A. Fotte Memorial Hospital, Inc.*, 741 F.2d 1486, 1494 (6th cir. 1984); *vacated on rehearing on other grounds*, 759 F.2d 546 (6th Cir. 1985); *cert. denied* 474 U.S., ____, 88 L.Ed.2s 284, 106 S.Ct. 342 (1985).

Here, key findings of fact were made with no evidentiary support. Foulks was not hired by DeForge; Foulks testified, twice, that he was hired by David Kalanich. Foulks did not apply for a PO II position; Foulks applied for a PO I position. Foulks did not qualify for a PO II position. No PO II position was

open. The finding that a white man was hired as a PO II within 30 days of Foulks' hiring is a pure and absolute fabrication. The findings that DeForge called Foulks a "nigger" or referred to him as a "nigger" is groundless; Foulks testified that he never heard DeForge use the word. Foulks' claim that he was forced to rewrite reports and that whites were not was not proved. Foulks testified that he did not know how many reports were rewritten by white officers. Several white officers testified that DeForge required them to rewrite many reports. There is no evidence that Himmilright's comments injured Foulks; the prospective employer hired Foulks a few days after the comments were made. There is no evidence that DeForge's comments caused an injury. There is no evidence that DeForge helped write the letter; there is no evidence that Himmilright participated in the wrongs blamed on DeForge; nothing ties Himmilright and DeForge to the acts of other APA employees; the finding of joint and several liability is baseless.

The District Court completely ignored the evidence. The Court of Appeals approved the opinion in two sentences. The most cursory review of the record would have revealed that most of the District Court's findings were without foundation. It would have also revealed that some of the findings were not supported by so much as an allegation and that some conflicted with testimony and evidence introduced by the plaintiff. The Court of Appeals' failure to apply Rule 52 to this case constitutes a gross departure from the accepted course of judicial proceedings and calls for an exercise of this Court's power of supervision.

II. The Decision Of The Court Of Appeals Is In Direct Conflict With This Court's Decision In *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Under the decision in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) the plaintiff must establish a *prima facie* case of racial discrimiation. In order to establish a *prima facie* case of discrimination, Foulks should have been required to prove by a preponderance of the evidence that:

1) he belongs to a racial minority; 2) he applied for the job of a PO II; 3) he qualified as a PO II; 4) DeForge was seeking applications for a PO II position; 5) he was rejected; 6) the PO II position remained open; and 7) DeForge continued to seek applicants having the same qualifications as Foulks. *See Burton v. State of Ohio,* 798 F.2 and 164, 165 (6th Cir (1986).

Foulks established that he was a member of a racial minority.

There is no evidence that Foulks applied for a PO II position. Foulks applied for a PO I position.

Foulks proved, through the testimony of his first witness, that he was not qualified to hold the position of a PO II. No evidence was introduced showing Foulks qualified as a PO II. Foulks further demonstrated his lack of qualification by failing to pass the examination that would have certified him as a PO I.

The plaintiff presented no evidence that the APA was seeking applicants for the position of PO II.

The plaintiff was not rejected. The plaintiff was hired to the position he applied for. He was hired by David Kalanich, not DeForge. DeForge had nothing to do with Foulks hiring or the hiring of any other person.

Since the APA was not seeking applicants for a PO II position, no position remained open and no further applicants were sought. The District Court's finding that a white was hired within thirty days is an utter fabrication.

The Ohio Civil Rights Commission and the courts that reviewed its decision found nothing wrong with Foulks' hiring. *Foulks v. Ohio Department of Rehabilitation and Correction,* 713 F.2d 1229, 1231 (6th Cir. 1983). The District Court, at the close of the hearing, made a tentative finding that there had been no racial discrimination in the hiring process. The court found the APA liable for discrimination, *Foulks,* at 1233-1234, and later, on remand, pinned the blame on DeForge.

III. The Decision Of The Court Of Appeals Is In Direct Conflict With This Court's Decision In *Texas Department Of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Foulks managed to establish only one *prima facie* claim of discrimination under Section 1981. He showed that Himmilright made negative comments to the Lucas County Probation Department in March, 1973. An official of the Lucas County Probation Department testified that he believed the comments were made as the result of racial prejudice. His belief was based on the statements of other parole officers. (His sources failed to corroborate his belief).

The defendants more than met their burden of articulating a non-discriminatory reason for Himmilright's remarks under the decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Other APA officials testified that Himmilright's opinion was correct. Foulks was antagonistic and a troublemaker. They also testified that he had poor relationships with his fellow workers and supervisors and that he was incompetent.

Foulks failed to meet his burden under *Burdine*. He introduced no evidence to show the testimony of other APA officials was untrue and resulted from bias and prejudice.

IV. The Decision Of The Court Of Appeals Is In Direct Conflict With This Courts Decision In *Memphis Community School District v. Stachura*, 477 U.S. ____, 91 L.ED2d 249 (1986).

With the exception of the wage differential resulting from the supposed discrimination in hiring, Foulks has not proved an injury. He has not proved an actual injury and cannot be entitled to compensatory damages. *Memphis Community School District v. Stachura*, 477 U.S. ____, 91 L.Ed.2d 249 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

Foulks failed to prove that the actions of DeForge caused an injury. The fact that Foulks was hired by the Lucas County Probation Department within days of Himmilright's statement conclusively shows that he was not injured. The absence of a compensable injury is further illustrated by the superficial and perfunctory treatment of the issues by the District Court and the Appellate Court.

V. The Decision Of The Court Of Appeals Is In Direct Conflict With This Courts Decision In *Rizzo v. Goode*, 423 U.S. 362 (1976).

As a result of the District Court's unexplained finding of joint and several liability, Himmilright is liable for the acts of his dead fellow employee. He is also liable for the damages caused, according to the District Court's first opinion, for the acts of the APA and other APA employees.

By holding the defendants jointly and severly liable, the District Court has neatly circumvented the rule requiring that liability for civil rights violations be based on a defendants personal involvment in the violation, *Rizzo v. Goode*, 423 U.S. 362, 370-371 (1976); *Monell v. New York City Department of Social Services*, 436 U.S. 658, 692 (1978).

VI. The Decision Of The District Court Is In Direct Conflict With This Courts Decision In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

The Appellate Court declined to rule on the preclusive effect of the denial of Foulks claim of discrimination by the O.C.R.C. because they found the APA immune from liability. *Foulks*, at 1231. On remand, the District Court, without proof, switched its finding of racial discrimination in hiring from the APA to DeForge.

The District Court's second decision was subject to preclucion under *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982). The claims involving Foulks' hiring before the O.C.R.C. and the District Court were identical. Foulks has never alleged, let alone proved, that he was hired by DeForge. The person who hired Foulks was certainly in privity with the APA. The O.C.R.C. decision and the judicial decisions upholding the O.C.R.C. decision would preclude the claim against the person who acted for the APA in hiring Foulks in state court, *City of Canton v. Maynard,* 766 F.2d 236 (6th Cir. 1985); *Stromberg v. Board of Education of Bratenahl,* 64 Ohio St. 2d 98 (1980), and in federal court, *Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984). *See also, University of Tennessee v Elliott,* 478 U.S. ____, 92 L.Ed.2d 635 (1986).

VII. The District Court Had No Jurisdiction Over Defendant DeForge Because No Actual Case Or Controversy Existed Involving DeForge.

Article III §2 of the Constitution imposes a threshold requirement that those who seek to invoke the power of a federal court must allege and show the existence of an actual case or controversy. *O'Shea v. Littleton,* 414 U.S. 488 (1974); *Flast v. Cohen,* 392 U.S. 83 (1968). The case or controversy must be a continuing one and must be "live" at all stages of the proceedings. *Roe v. Wade,* 410 U.S. 113 (1973).

DeForge's death, coupled with Foulks' failure to perfect a claim against his estate, and the failure to substitute a defendant by January 13, 1983, extinguished any claim against DeForge. See Rule 25(a)(1). Since all the claims involving DeForge's personal acts were extinguished, the District Court was without jurisdiction to decide the issues. No actual, live case or controversy existed on the issues of DeForge's hiring of Foulks, DeForges remarks and Foulks' rewriting of reports.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served upon Respondent, Curtis Foulks, Jr., by forwarding such copies to his counsel, Geofferey H. Davis, 220-221 Bell Building, Toledo, Ohio 43624, by United States Mail, postpaid, this _____ day of October, 1986. I further certify that all parties required to be served have been served.

ALLEN P. ADLER
Assistant Attorney General

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN HIMMILRIGHT

Petitioner,

v.

CURTIS FOULKS, JR.

Respondent.

ON PEITION FOR WRIT OF CERTIORAIR
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 85-3725

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CURTIS FOULKS, JR.,
Plaintiff-Appellee,

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION ADULT PAROLE AUTHORITY; GEORGE F. WENTON, CHIEF OF THE OHIO ADULT PAROLE AUTHORITY, RAY E. GIANETTA, SUPT. OF THE PAROLE SUPERVISION SEC. OHIO ADULT PAROLE AUTHORITY, JAMES H. CALHOUN, SUPT. OF THE PROBATION DEVELOPMENT SEC. OHIO ADULT PAROLE AUTHORITY, Individually and in their Official Capacity,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed August 11, 1986

Before: KEITH and MERRITT, Circuit Judges; and CONTIE, Senior Circuit Judge

MERRITT, Circuit Judge. In this case arising under 42 U.S.C. §1981, the Court previously remanded the case to the District Court with instructions, 713 F.2d 1229 (6th Cir., 1983), after a statement of the facts and issues. On remand the District Court found liability and damages against the individual defendants and then awarded attorney fees against the state defendant. The award of attorneys fees against the

state defendant was error and must be reversed for the reason set out in our original opinion, 713 F.2d at 1233, and in the subsequent Supreme Court case of *Kentucky v. Graham*, 105 S.Ct. 3099 (1985).

On the issue of liability and damages, we conclude that the findings of fact are not clearly erroneous to the extent that they say that the individual defendants created an employment environment of racial bias and that the defendant, Himmelright, sought to prevent plaintiff's subsequent employment after his termination from APA. Although the amount of damages awarded are not as clearly based in the record as we would like to see, we are unable to find that the amounts are unrelated to the injury suffered by the plaintiff.

We therefore affirm the judgment against the individual defendants and reverse the judgment for attorneys fees against the state defendant.

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
NORTHERN OHIO

Curtis Foulks, JR.,

v.

Ohio Department Of Rehabilitation &
Correction Adult Parole Authority, et. al.,

Docket Number: **C 76-57**

Judge: **Honorable Nicholas J. Walinski**

Filed Aug. 8, 1985

DECISION BY COURT. This action came to hearing before the Court with the judge named above presiding. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendants DeForge and Himmelright to pay $4,558.70 compensatory damages. Attorney fees of $6,132.00; plaintiff to pay $1,367.71 and defendant Ohio Dept. of Rehabilitation & Correction Adult Parole Authority to pay balance of $4,764.29. Case dismissed.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Curtis Foulks, Jr.,
Plaintiff,

v.

Ohio Department of Rehabilitation and Correction Adult Parole Authority, et. al.,
Defendant.

Case No. C 76-57

Filed August 8, 1985

OPINION AND ORDER

This cause is before the Court on remand from the Sixth Circuit Court of Appeals, dated March 9, 1984. After numerous delays and pretrials, the plaintiff moved for summary judgment on December 31, 1984, the defendants opposed on February 5, 1985, and the plaintiff replied on March 5, 1985. The matter is now decisional.

This action to right a discrimination wrong has persisted for nine (9) years. Thus far the plaintiff's claim of racial discrimination has been sustained by the Ohio Civil Rights Commission (OCRC), the Franklin County Ohio Court of Common Pleas, and the Court of Appeals for Franklin County, Ohio.

The Sixth Circuit Court of Appeals felt that this Court's findings of fact as to the defendants Morris DeForge (DeForge) and John Himmelright (Himmelright) were too unspecific to rule on their liability and remanded this cause for further findings. The Court of Appeals also dismissed the Ohio Adult Authority (APA) as being immune from a damage suit for retrospective payment out of state funds pursuant to the Eleventh Amendment. This Court agrees as to the damage claim.

Pursuant to the mandate of the Sixth Circuit, this Court more specifically finds as follows:

FINDINGS OF FACT

1. At all times pertinent, defendants DeForge and Himmelright were officers of the APA and the plaintiff's immediate supervisors. All discriminatory acts complained of by plaintiff were committed because of their individual prejudice, but were also the acts of the APA. The acts enumerated in this Court's opinion of August 12, 1980 will only be summarized herein.

2. Plaintiff was hired by the APA through defendant DeForge on Feburary 21, 1971 as the Parole Officer I (PO I) level, even though he had most of the qualifications of PO II. Thirty days later a white applicant was hired at PO II with less qualifications. The Court finds that DeForge's disparate treatment of plaintiff was racially motivated.

3. During the period of plaintiff's employment, defendant DeForge made racial slurs in the presence of the plaintiff, calling him a "Black Fox" and "Dark Gable". Moreover, the defendant referred to plaintiff as "Nigger" outside plaintiff's presence. DeForge also told plaintiff that DeForge's daughter was raped by a black man. The Court finds that the evidence established a racial animus on the part of DeForge.

4. Defendant DeForge also imposed restrictions and duties upon plaintiff that were not imposed on the white probation officers. The Court finds that plaintiff was disparately treated by defendant DeForge.

5. Defendant Himmelright sent an entirely negative recommendation to the Lucas County, Ohio, Probation Department where plaintiff sought employment. The recommendation was investigated by Lucas County officers and found to be racially motivated and false and tantamount to

libel. The Court finds defendant Himmelright's acts to be racially motivated and damaging to plaintiff career.

6. Although only defendants DeForge and Himmelright can be held responsible for the retrospective damages, the Court finds that at all times pertinent the defendants acted for the APA.

CONCLUSIONS OF LAW

1. The plaintiff, Curtis Foulks, Jr. has established a prima facie case of damaging disparate racial discrimination.

2. The defendants DeForge and Himmelright discriminated against plaintiff Foulks, and are jointly and severally liable to plaintiff for compensatory damages as originally awarded in the sum of $4,558.70

3. The Court further awards $6,132.00 as reasonalbe attorney fees to be paid by plaintiff in the sum of $1,367.71 and the balance $4,764.29 to be paid by the APA under the authority of *Hutto v. Finney,* 437 U.S. 678, 692 (1978).

IT IS SO ORDERED.

/s/ NICHOLAS J. WALINSKI
NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Curtis FOULKS, Jr.,
Plaintiff-Appellee,
Cross-Appellant,

v.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, Adult Parole Authority, and Morris DeForge, and John R. Himmelright,
Defendants-Appellants,
Cross-Appellees.

Nos.. 81-3315, 81-3316.

United States Court of Appeals,
Sixth Circuit.

Argued Jan. 13, 1983.

Decided Aug. 4, 1983.

Rehearing and Rehearing En Banc
Denied Oct. 3, 1983

Former black parole officer brought employment discrimination action against Ohio Adult Parole Authority and former supervisors. The United States District Court for the Northern District of Ohio, Nicholas J. Walinski, J., entered judgment in favor of former officer, awarding damages and attorney's fees, and APA and former supervisors appealed. The Court of Appeals, Merritt, Circuit Judge, held that: (1) award of damages and attorney's fees against APA violated Eleventh Amendment prohibition against judgments to be paid out of the public fisc; (2) former officer could maintain constitutional tort action against his former supervisors for any of their individual acts which constituted violations of his civil rights under federal statutes; but (3) remand was required for reconsideration of findings and conclusions and specific statements as to basis for relief against former supervisors

and amount of damages, if any, suffered by reason of acts of each.

Reversed and remanded.

Keith, Circuit Judge, filed dissenting opinion.

1. Judgment 828(3.25)

Where neither of individual defendants was defendant in employment discrimination claimant's Ohio Civil Rights Commission and state actions, claimant's pursuit of his state remedies in OCRC and state courts did not preclude further litigation of employment discrimination claim in federal court against such defendants. 42 U.S.C.A. §§ 1981, 1983, 1985(3); U.S.C.A. Const. amend. II; Ohio R.C. § 4112.02.

2. Judgment 646

Employment discrimination claimant could not extend Ohio Civil Rights Commission's liability finding to individual defendants in claimant's federal action through collateral estoppel where individual defendants were not and, under Ohio civil rights statute, could not have been parties to state proceeding and thus never had a full and fair opportunity to litigate liability issue. 42 U.S.C.A. §§ 1981, 1983, 1985(3); U.S. C.A. Const.Amend. 11; Ohio R.C. § 4112.02.

3. Federal Courts 265

Award of damages and attorney's fees against Ohio Adult Parole Authority in employment discrimination action violated Eleventh Amendment prohibition against judgments to be paid out of public fisc. 42 U.S.C.A. §1981;; U.S.C.A. Const.Amend.11.

4. Civil Rights 13.17

Where trial court failed to award any injunctive relief against Ohio Adult Parole Authority in employment discrimination action, APA could not be held liable for any of complainant's attorney's fees. 42 U.S.C.A. § 1981; U.S.C.A Const.Amend. 11.

5. Federal Courts 269

Eleventh Amendment does not prevent plaintiffs from bringing suit for money damages against state officials provided that the defendants are sued in their individual capacities. 42 U.S.C.A § 1981; U.S.C.A Const.Amend. 11.

6. Federal Courts 269

Former black parole officer was not barred by Eleventh Amendment from maintaining constitutional tort action against his former supervisors for any of their individual acts constituting violations of his civil rights under federal statute. 42 U.S.C.A. § 1981; U.S.C.A Const.Amend. 11.

7. Federal Courts 941

Remand was required for reconsideration of findings and conclusions and specific statements of basis for relief against former black parole officer's former supervisors and of amount of damages, if any, suffered by reason of acts of each where, rather than defining degree of each supervisor's liability, trial judge made general finding that the former black parole officer "should and does prevail in his action under 42 U.S.C.A § 1981," such conclusion was based on numerous findings involving acts committed by persons other than former supervisors, and it was impossible to determine what injury and damage trial judge found was caused by each supervisor's acts and why they were jointly and severally liable. 42 U.S.C.A § 1981; Fed.Rules Civ. Proc.Rules 52, 52(a), 28 U.S.C.A.

Allen P. Adler (argued), Michael Flax, Asst. Attys. Gen., Columbus, Ohio, for defendants-appellants, cross-appellees.

Geoffrey H. Davis (argued), Toledo, Ohio, for plaintiff--appellee, cross-appellant.

Before KEITH and MERRITT, Circuit Judges, BROWN, Senior Circuit Judge.

In this employment discrimination case, the defendants appeal a decision by Judge Walinski of the Northern District of Ohio awarding plaintiff Curtis Foulks, Jr. damages and attorney's fees against the state agency that employed him and against his former supervisors, under the Civil Rights Act of 1866, 42 U.S.C § 1981. We reverse and remand for further proceedings.[1]

I.

On February 21, 1971, Curtis Foulks was hired as a Parole Officer (P.O.) I at the Lima, Ohio, office of the Adult parole Authority (APA), a division of the Ohio department of Rehabilitation and Correction. Although Foulks' five months of substitute teaching experience fell short of the one year's related work experience required for employment as a P.O. II-the classification immediately superior to Foulks' position-he claims that defendants' failure to hire him as a P.O. II was racially motivated.[2] Plaintiff also claims that his supervisors subjected him to harassment, which included racial epithets, unreasonalbe rejection of his probation reports, exclusion from certain seminars, and arbitrary restriction of his graduate study course load. In the fall of 1971, Foulks was temporarily discharged for approximately seven weeks, due to lack of funding for P:O. I positions. He contends that, had he been hired as a P.O. II (or had he been promoted to that level), he would not have suffered the layoff. He also alleges that defendants continued to harass him after his reinstatement, and that this harassment led ultimately to his resignation in September, 1972. Finally, Foulks claims that defendants frustrated his attempt to secure employment as a Probation Officer in the Lucas County, Ohio Adult Probation Department by writing him an unfavorable recommendation motivated by racial prejudice.

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[1]This disposition makes unnecessary consideration of plaintiff's cross appeal regarding the size of the District Court's damage and attorney's fees awards.

[2]Foulks notes that the one year of related work experience required for P.O. II status was occasionally waived by defendants, and the record shows that the requirement was in fact waived for a white applicant in September, 1971.

The defendants, on the other hand, maintain that plaintiff did not experience racial discrimination at APA. In addition to other evidence, they cite the testimony of Spencer Turner, defendant DeForge's black supervisor and an active member of the Urban League and the NAACP. Contradicting plaintiff's allegations, Mr. Turner testified that he did not consider DeForge racially biased, and added that he personally had not encountered any racial discrimination in his 31 years at APA.

On July 18, 1972, Foulks filed a complaint with the Ohio Civil Rights Commission (OCRC), claiming that the APA had discriminated against him because of his race by hiring him at a level below his qualifications, by denying him promotion, and by harassing him. Following a hearing held nearly four years later, the OCRC found that the APA had discriminated against Foulks "through disparate treatment and harassment by his supervisor and through a denial of promotion." *Department of Rehabilitation and Correction, Adult Parole Authority v. OCRC,* No. 80AP-287, slip op. at 2 (Franklin County Ct.App.1981). The OCRC entered an order on November 22, 1978, directing the APA to pay Foulks retroactively the difference between P.O. II and P.O. I salaries for July 14, 1972, to September 15, 1972, the period during which-according to the Commission-Foulks should have enjoyed P.O. II status. This damage award amounted to a total of approximately $125. The APA appealed, and the decision was upheld twice in state court, first by the Franklin County Court of Common Pleas on March 19, 1980, then by the Franklin County Court of Appeals on May 28, 1981. *Department of Rehabilitation and Correction, Adult Parole Authority, supra.* Litigation at the state level finally ended when the Ohio Supreme Court dismissed the APA's last appeal for want of a substantial constitutional question on September 6, 1981.

By this time, plaintiff was also pursuing federal remedies. On February 20, 1976, he filed a complaint in the court below, charging the APA with violation of 42 U.S.C. § 1981, as described above.[3] On March 31, 1977, the District court

[3]The original complaint also named the OCRC and some 29 state officials as defendants. Before trial, the district Court dismissed the OCRC and all but two of the individual defendants. The court also dismissed claims plaintiff had advanced under sections 1983 and 1985(3) of Title 42, and plaintiff has not appealed these rulings.

denied defendants' Motion to Dismiss, which called the court's attention to the concurrent state law proceedings and requested dismissal based on plaintiff's failure to exhaust state remedies or, in the alternative, on application of the abstention doctrine.

On appeal, defendants have recast these dismissal arguments under the related doctrines of *res judicata* and collateral estoppel,[4] contending that plaintiff's pursuit of his state remedies in the OCRC and state courts precludes further litigation of his employment discrimination claim in federal court. Because we find that the eleventh amendment deprived the District Court of jurisdiction over the APA (*see* Part II, *infra*), it is unnecessary for us to consider the question whether preclusion concepts apply to an employment discrimination claim first advanced under state civil rights laws and then litigated under § 1981 in federal court.

[1,2] Regarding defendants DeForge and Himmelright, it is clear that preclusion does not apply, since neither of these individuals was a defendant in Foulks' OCRC and state court actions. Although the state civil rights statute, OHIO REV. CODE ANN. § 4112.02 (Baldwin) proscribes "discriminatory practice" by an "employer," supervisors-such as DeForge and Himmelright-do not fall within the scope of that term. *See Sowers v. OCRC,* 20 Ohio Misc. 115,252 N.E.2d 463 (1969) (school board member was not an "employer" under the Ohio Civil rights statute). Thus, DeForge and Himmelright could not have been parties to the state proceeding. They cannot invoke *res judicata* because the Ohio judgment did not emcompass any claim against them. On the other hand, plaintiff cannot extend the OCRC liability finding to them through collateral estoppel because DeForge and Himmelright never had a "full and fair opportunity" to litigate that issue. *See Kremer v. Chemical Const. Corp.,* 456 U.S. 461, 481, 102 S.Ct. 1883, 1897, 72 L.Ed. 2d 262, 280 (1982); *Montana v. United States,*

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[4]Although the original Motion to Dismiss does not employ the terms "*res judicata*" or "collateral estoppel," plaintiff conceded at oral argument that defendants had raised the issue below.

440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S 313, 328-29, 91 S.Ct. 1434, 1442-43, 28 L.Ed.2d 788 (1971); *Restatement (Second) of Judgments* § 28, Comment j (1982).

II.

> The eleventh amendment of the U.S. Constitution provides: [T]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State, U.S. CONST. amend. XI.

In *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1889), the Supreme court held that sovereign immunity bars a citizen from suing his own state under the Constitution and laws of the United States, even though the precise language of the eleventh amendment does not mention such a suit. However, the courts have permitted suits challenging the legality of state action when the plaintiff names as defendant the state officer or agency instead of the state itself. In *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Court recognized an equitable cause of action against state officers in their individual capacities for violations of constitutional rights. The *Young* Court created the fiction that unconstitutional action strips the state officer "of his official or representative character" and thus deprives him of the state's sovereign immunity. *Id.* at 159-60, 28 S.Ct. at 453-54.

The Supreme Court has recently restricted the scope of this exception. In *Edelman v. Jordan,* 415 U.S. 651, 677, 94 S.Ct. 1347, 1362, 39 L.Ed.2d 662 (1974), the Court limited the federal courts to providing "prospective injunctive relief" against state officials and barred any "retroactive award

which requires the payment of funds from the state treasury."[5] *See also Quern v. Jordan,* 440 U.S. 332, 347, 99 S.Ct. 1139, 59 L. Ed.2d 358 (1979) (reaffirming *Edelman* holding that eleventh amendment limits federal courts to awarding prospective injunctive relief in § 1983 actions); *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978)(*per curiam*); *Sessions v. Rusk State Hospital,* 648 F.2d 1066 (5th Cir. 1981)(employment discrimination action under § 1981 barred by eleventh amendemnt); *Martin v. University of Louisville,* 541 F.2d 1171 (6th Cir.1976)(eleventh amendment applies where suit against state agency or officers is in essence one for recovery of money from state treasury).

[3] In the instant case, the District Court awarded plaintiff damages and attorney"s fees but did not order any injunctive relief. Entirely retrospective in nature, the court's order directs the defendants jointly to pay plaintiff a total of $9322.99 in damages and attorney's fees. Regarding the APA, this award violates the eleventh amendment prohibition against judgments to be paid out of the public fisc. *Edelman v. Jordan, supra.*

Plaintiff urges that suits under § 1981 should not be subject to the *Edelman* rule, noting that the Supreme Court permitted a backpay award against a state defendant in *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), a Title VII employment discrimination case. In analyzing Title VII, the *Fitzpatrick* Court found clear evidence of "congressional intent to abrogate the immunity conferred by the Eleventh Amendment," *id.* at 451-52, 96 S.Ct. at 2669, and held that § 5 of the fourteenth amendment authorized Congress to carve out such an exception.[6] Plaintiff contends that

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[5]Thus, although the plaintiff in *Edelman* succeeded in showing that the Illinois officials charged with administering the federal-state programs of Aid to the Aged, Blind, or Disabled, had not complied with federal law, the Supreme Court disallowed the awarding of retroactive benefits as an encroachment on sovereign immunity. The Court also refused to extend the *Young* fiction to monetary awards, observing that "[t]hese funds will obviously not be paid out of the pocket of petitioner Edelman." *Id.* at 664, 94 S.Ct. at 1356.

[6]Section 5 of the fourteenth amendment reads as follows: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

the implementing clause of the thirteenth amendment also gave Congress the power to abrogate state soverign immunity,[7] and that congress invoked that power by promulgating the Civil Rights Act of 1866. But even if one assumes *arguendo* that plaintiff is correct to this point, the lack of evidence of a clear congressional purpose to use this power in § 1981 fatally undermines his position. *See Employees v. Missouri Public Health Dep't.*, 411 U.S. 279, 283-85, 93 S.Ct. 1614, 1617-18 36 L.Ed.2d 251 (1973). Whereas Congress amended Title VII in 1972 specifically to establish state liability for violations of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e(a), (f); *Fitzpatrick v. Bitzer, supra,* 427 U.S. at 449 n. 2, 96 S.Ct. at 2668 n. 2 plaintiff has not presented us with any manifestation of a similar congressional intent regarding § 1981. "Congress, acting responsibly, would not be presumed to take such action silently." *Employees, supra,* 411 U.S. at 284-85, 93 S.Ct. at 2617-18.

[4] The District Court's damage award against the APA must therefore be set aside. Moreover, because the District Court failed to award any injunctive relief against the state defendant, the APA cannot be held liable for any of plaintiff's attorney's fees.[8] This holding does not foreclose the District Court from awarding attorneys fees against individual defendants if plaintiff should prevail on remand (see part III, *infra*).

III.

[5,6] The eleventh amendment does not prevent plaintiffs from bringing suits for money damages against state officials provided that the defendants are sued in their individual capacities. *Scheuer v. Rhodes,* 416 U.S. 232, 237-38, 94 S.Ct. 1683, 1686-87, 40 L.Ed.2d 90 (1974); *Great Northern Life Inc. Co. v. Read,* 322 U.S. 47, 50-51, 64 S.Ct. 873, 874-75, 88 L.Ed. 1121 (1944); *In re Ayers,* 123 U.S. 443, 500-01, 8 S.Ct. 164, 180, 31 L.Ed. 216 (1887). In such cases, "damages are payable by the officer, provided primary and remedial law gives the

[7]This clause, section 2 of the thirteenth amendment, reads as follows: "Congress shall have power to enforce this article by appropriate legislation."

[8]Plaintiff has not appealed the District Court's failure to award injunctive relief against the APA. Accordingly, we do not have that question before us in this appeal.

plaintiff a cause of action against the officer for the specific actions contested." L.Tribe, *American Constitutional Law* 132 (1978). Thus, plaintiff in the instant case could maintain a constitutional tort action against his former supervisors, Messrs. DeForge and Himmelright for way of their individual acts which constitute violations of Foulks' civil rights under §1981.

Rule 52 of the Federal Rules of Civil Procedure provides that the distirct court in a bench trial "shall find the facts specially and state separately its conclusions of law thereon." Fed.R.Civ.P. 52(a). This rule is at least in part designed "to afford the appellate court a clear understanding of the ground or basis of the decision of the trial court." *Snyder v. United States*, 674 F.2d. 1359 (10th Cir.1982).

[7] The District Court's findings of fact and conclusions of law fail to provide us with a sufficient basis for review of the judgment after the elimination of the state defendant through sovereign immunity. The court's order assessing damages and attorney's fees extended to defendants DeForge and Himmelright as well as to the APA. Rather than defining the degree of each defendant's liability, Judge Walinski made a general finding that the plaintiff "should and does prevail in his action under 42 U.S.C. § 1981." *Foulks v. Ohio Dep't of Corrections*, No. 76-57 (W.D.Ohio 1980). This conclusion was based on numerous findings of fact contained in the same order involving acts committed by persons other than these two defendants. It was the totality of all these acts that appears to be the basis of the award against the APA. Of those facts, only the following related specifically to defendants DeForge and Himmelright:

> The evidence shows that Defendant DeForge repeatedly referred to the plaintiff as "that black fox" and "nigger." . . .DeForge would also frequently required plaintiff to rewrite his reports although his objections were vague and no similar requirement was imposed on the other white probation officers under his supervision.

. . . .

> Plaintiff applied for a job with the Lucas County Adult Probation Department in the spring of 1973. Defendant John Himmelright responded negatively to a request for a recommendation by saying that plaintiff was antagonistic and a troublemaker who displayed a poor relationship with his fellow workers and was generally hard to get along with. A subsequent investigation by J.D. Rietzke of that Lucas County agency revealed that the defendant's comments were racially motivated and false. In fact, two of plaintiff's co-workers as well as his regional supervisor in the state office gave him outstanding recommendations.
>
> The Court finds that the defendant's remarks were racially motivated and were responsible for plaintiff's failure to get this job on this occasion, although he did later work for the Lucas County Probation Department.

Id. Thus, the District Court apparently did not hold Himmelright and DeForge individually responsible for all of the disparate treatment Foulks experienced. It is impossible for us to determine what injury and damage Judge Walinski found was caused by DeForge's acts and what injury and damage was caused by Himmelright's and why they are jointly and severally liable. We are also uncertain as to the precise dimensions of any § 1981 cause of action that plaintiff might retain against DeForge and Himmelright after the APA is dismissed as party defendant.

We therefore remand the case and request that the District court reconsider its findings of fact and conclusions of law and to state specifically the basis for relief against these two remaining defendants and the amount of damages, if any, suffered by reason of the acts of each. This requires the District Court-with the assistance of counsel for the parites-to define the elements of the statutory tort or torts claimed to have been committed under § 1981, and then to apply the elements so defined to the facts of the case. If the court does find such a

cause of action, it should then reassess the damage award in light of its revised conclusions of law and findings of fact.

The judgment of the district court is reversed and remanded for further proceedings consistent with this opinion.

KEITH, Circuit Judge, dissenting.

Over ten years ago, the plaintiff Curtis Foulks was the victim of racial discrimination. His claims of racial discrimination have been sustained by the Ohio Civil Rights Commission, the Franklin County Court of Common Pleas and the Ohio Court of Appeals in Franklin County. The District Court below also found discrimination and awarded damages and costs, including attorney's fees. Today, the majority remands the case for reconsideration of the findings of fact and conclusions of law with respect to the individual defendants, thus further delaying redress of the wrongs plaintiff has suffered. To deny prompt relief gives credence to the age-old maxim, justice delayed is justice denied. I respectfully dissent.

I.

The majority concludes that the Ohio Department of Rehabilitation and Correction, Adult Parole Authority (APA) cannot be sued for money damages because of the Eleventh Amendment. I agree.

Section 1981 was derived from the Civil Rights Act of 1866 (Act). The intended purpose of Section 1981 was to uproot the institution of slavery and eradicate its badges and incidents. *Long v. Ford Motor Company*, 496 F.2d. 500, 504 (6th Cir.1974). *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). It is designed as "an equalizing provision to ensure that rights do not vary according to race." *Long*, 496 F.2d at 505. As Senator Trumbull, the sponsor of the bill, stated:

> [The Thirteenth Amendment] declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom. There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.

Jones v. Alfred H. Mayer Co., 392 U.S. at 431-2, 88 S.Ct. at 2199 (1968) (*quoting* Cong. Globe, 39th Cong., 1st Sess., 43, 474).

Given the Act's purpose to broadly implement the Thirteenth Amendment, it is reasonable to conclude that Congress meant to abrogate the States' sovereign immunity to the extent necessary to remedy state-sponsored discrimination. In fact, several well reasoned Supreme Court dissents have argued that Section 1981 was meant to reach *only* discriminatory state action. *Runyon v. McCrary*, 427 U.S. 160, 192, 96 S.Ct. 2586, 2605, 49 L.Ed.2d 415 (1976)(White, J., dissenting); *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 449, 88 S.Ct. at 2208 (Harlan, J., dissenting). Unfortunately, Section 1981 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it show that Congress considered and firmly decided to abolish the Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 345, 99 S.Ct. 1139, 1147, 59 L.Ed.2d 358 (1979). Hence, Section 1981 cannot meet the Supreme Court's rigid criterion for finding Congressional intent to abrogate sovereign immunity. Accordingly, I concur in the dismissal of the APA as a party.

II.

The majority overturns the district court's award of attorney's fees against the APA because no injunctive relief was awarded against the APA. However, attorney's fees could still be awarded against the APA to the extent that defendants DeForge and Himmelright acted on behalf of the APA in

discriminating against the plaintiff. This is clear from *Hutto v. Finney*, 437 U.S. 678, 692, 98 S.Ct. 2565, 2574, 57 L.Ed.2d 522 (1978), where the court affirmed the entry of an award of attorney's fees to be paid out of the Arkansas State Department of Correction's budget because of the conduct of state officials. In this case, defendants DeForge and Himmelright acted in their official capacities on behalf of the APA. Attorney's fees can thus be imposed directly on the APA pursuant to *Hutto v. Finney, supra*. I dissent from any suggestion in the majority opinion to the contrary.

III.

I am at a loss to explain why the majority remands this case. This disrict court identified specific acts of discrimination by defendants DeForge and Himmelright who were APA officers and the plaintiff's supervisor. The district court assessed damages against DeForge, Himmelright and the APA jointly. No other defendants or possible defendants were named in the opinion below. Dismissal of the APA does not require reconsideration of the liability finding with respect to DeForge and Himmelright. Since liability has already been established, the district court's action should be limited to the apportionment of damages.

The majority's remand is particularly distressing because two independent bodies-the Ohio Civil Rights commission and the United States District Court-have determined that the plaintiff was a victim of racial discrimination.

In an employment setting, a violation of Section 1981 exists when an employer places more stringent requirements on employees because of their race. *Long*, 496 F.2d at 504. In the present context, such a violation indisputedly occurred when DeForge held the plaitiff to more stringent standards by requiring him to constantly rewrite reports though no similar demands were made of others. Moreover, DeForge's disparate treatment of the plaintiff was evidenced by his constant denial of plaintiff's request to attend training conferences, while the requests of others were routinely granted.

Section 1981 also forbids the degradation of individuals because of their race. In addition to denying Mr. Foulks' request to attend training seminars, the defendants created an atmosphere charged with racial tension. DeForge openly discussed his lack of confidence in Mr. Foulks' work, and expressed his belief that Black people are liars and cannot be trusted. His disdain for the race further resounds in his use of the word "Nigger' and his reference to Mr. Foulks as a "Black Fox" and a "Black Gable". In the midst of this racially charged atmosphere, DeForge allegedly told Mr. Foulks, "My daughter was raped by a Black man, and I know how you feel."

Moreover, Mr. Foulks' professional advancement was greatly hindered by the manifestations of the defendants' prejudice. Mr. Foulks testified that his professional activities were largely circumscribed by DeForge's efforts to minimize his contact with White counterparts. After continuously being denied promotions, Mr. Foulks sought employment elsewhere. His efforts in this regard were effectively thwarted when Mr. Himmelright responded negatively to a request for a recommendation. According to Mr. Himmelright, Mr. Foulks was antagonistic and a troublemaker who displayed a poor relationship with his fellow workers and was generally hard to get along with. As the court below correctly noted, a subsequent investigation revealed that the comments were false and racially motivated. In fact, Mr. Foulks had received several outstanding recommendations, including one from his regional supervisor in the state office.

In this case, the record clearly reflects that DeForge subjected the plaintiff to dissimilar treatment. The question the district court was called upon to answer was whether such disparate treatment was motivated by racial animus towards Black people. The district court concluded that it was so motivated. The fact that DeForge called a Black person a Nigger in front of an APA employee is probative of racial animosity and disparate treatment. *See Rowe v. Cleveland Pneumatic Co., Numerical Control,* 690 F.2d 88, 97 (6th Cir.1982). While there is nothing per se illegal about calling someone a Nigger, Cracker, Spic, Wop or Kike the use of these

despicable terms is morally reprehensible, and this court should not in any way sanction their use.

I have carefully considered the majority opinion remanding this case for yet another discrimination determination. There is no justification for it. The court's decision today perpetuates rather then rectifies a long-standing injustice.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

CIVIL ACTION FILE NO. C 76-57

CURTIS FOULKS, JR.

vs.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS ADULT PAROLE AUTHORITY, et. al.,

JUDGMENT

This action came on for trial before the Court, Honorable Nicholas J. Walinski, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

It is Ordered and Adjudged Court enters judgment in favor of plaintiff and against the defendants, Ohio Department of Rehabilitation and Correction Adult Parole Authority, Morris DeForge, Individually as as Unit Supervisor Parole Supervision, Sec., Ohio Adult Parole authority and John R. Himmelright, Individually and as Unit Supervisor, Probation Development Sec., Ohio Adult Parole authority, jointly and severally in the sum of $4558.60. Attorney fees sum of $6.132.00. Plaintiff to pay sum of $1.367.71 toward attorney fees defendant to pay sum of $4,764.29 toward attorney fees.

/s/ NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Dated at TOLEDO, OHIO, this 27th day of April, 1981.

JAMES S. GALLAS
Clerk of Court

/s/ C.L. Kurschat
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS FOULKS, JR.
Plaintiff,

v.

OHIO ADULT PAROLE AUTHORITY
et. al.,
Defendants.

No. C 76-57

ORDER

* * *

This cause is before the Court for an assessment of damages, on plaintiff's affidavits and defendants' memoranda.

This Court, on the issue of liability, found in the plaintiff's favor on August 12,1980, and the matter was thereafter continued for further proceedings leading to a finding on damages and attorney fees.

From the salary level data of Parole Officer 2 compared to plaintiff's Parole Officer 1 status, which subjected him to layoffs, the Court finds that the plaintiff is entitled to $2,279.35 as compensatory damages.

The Court finds, from subsequent events, that plaintiff's Parole Officer 1 status on hiring was racially motivated, and that therefore plaintiff should have been hired March 6, 1971 as a Parole Officer 2.

The actual damages for the discrimination, humiliation, and interference suffered by the plaintiff are more difficult to ascertain. Accordingly, the court will award $2,279.35 as additional damages, resulting in a total verdict for the plaintiff of $4558.70.

Counsel for plaintiff also seeks attorney fees for having prevailed in the civil rights action. He is so entitled, and seeks $35.00 an hour for office time and $40.00 an hour for trial time, listing a total of 204.4 hours of case time. The Court notes with appreciation the meticulous list and times of legal services rendered by plaintiff's counsel. However, since this cause vindicated only a single individual's rights and has no great public impact, rather than nicely analyze and parse the legal services rendered in this overly prolonged case, the Court will allow $30.00 per hour for the claimed legal services. This results in an award of attorney fees of $6,132. Out of the fund created by the Court in favor of the plaintiff, the plaintiff will contribute 30% toward the attorney fees, or $1,367.71. The balance of the attorney fees, $4,764.29, is to be contributed by the defendants jointly and severally.

Accordingly, the Court enters judgment in favor of the plaintiff and against the defendants jointly and severally in the sum of $4,558.70.

The Court further awards $6,132 as attorney fees to be paid from plaintiff's verdict in the sum of $1,367.71, and the balance by the defendants jointly and severally.

Accordingly, judgment is entered for the plaintiff in the sum of $3,190.00, and in favor of Geoffrey E. Davis, Esq. in the sum of $6,132 as attorney feesThe Court further finds that the plaintiff suffered no future wage loss from the time of his termination. IT IS SO ORDERED.

/s/ NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Toledo, Ohio
April 27, 1981.

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this court on April 27, 1981 James S. Gallas, Clerk

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF OHIO WESTERN DIVISION

CURTIS FOULKS, JR.

vs.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS, et. al.,

CIVIL ACTION FILE NO. 76-57

JUDGMENT

This action came on for trial before the Court, Honorable Nicholas J. Walinski, United States District Judge, presiding, and the issues having been truly tried and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff prevails, damages to be determined.

/s/ NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Dated at TOLEDO, OHIO, this 12th day of August, 1980.

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
James S. Gallas, Clerk
Clerk of Court

Attest: James s. Gallas, Clerk
U.S. District Court Northern District of Ohio
/s/ P. L. Kurschat
Deputy Clerk

By: /s/ P. L. Kurschat
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CURTIS FOULKS, JR.,
Plaintiff,

vs.

OHIO DEPARTMENT OF
Defendants.

No. C 76-57

OPINION and ORDER

* * *

WALINSKI, J:

This cause is before the Court for disposition on the merits following a hearing conducted on February 4-7, 1980. As a black citizen, plaintiff brings his action under the provisions of the Civil Rights Act purusant to 42 U.S.C. §§ 1981, 1983, 1985(3), and 1988, to redress alleged deprivations of plaintiff's right under the Fourteenth Amendment to be free from racial discrimination in employment. Plaintiff seeks declaratory, injuncitve, and monetary relief. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

I.

Plaintiff was hired by Defendant Ohio Department of Rehabilitation and Correction (Department) of the Adult Parole Authority (APA) on February 21, 1971. He was employed as a Parole Officer I and assigned to the Parole Supervision Section in the district office in Lima, Ohio. At that time parole officers were hired at five different salary levels and classified by number. From the lowest salary level, Parole Officer I, the salary levels increased to that of Parole Officer V. Plaintiff's

attempt to be classified as Parole Officer II on the basis of his prior teaching experience was denied by the APA. On September 1, 1971, plaintiff was laid off but was reinstated on October 17, 1971, and worked for the defendant until September 15, 1972, at which time he resigned. Plaintiff brings his action against both the Department of Rehabilitation and Correction of the Adult Parole Authority and various officials thereof. He asserts that his layoff was the result of racially discriminatory policies and treatment directed at him by the defendants in hiring him at the Parole Officer I level, and in laying him off. The only remaining defendants are Morris DeForge, John Himmelright and the APA. This Court has dismissed plaintiff's allegations of a conspiracy pursuant to 42 U.S.C. § 1985(3).

The alleged racial discrimination directed at the plaintiff supposedly manifested itself in several ways. The plaintiff alleges that he was hired as a Parole Officer I although he was qualified to be a Parole Officer II. The plaintiff also alleges that Mr. DeForge, his supervisor from April to September of 1971, made racial slurs in his presence, assigned him unnecessary work, and belittled his job performance. Plaintiff was also allegedly excluded from professional conferences, ignored upon filing a grievance, deterred from a deserved promotion to Parole Officer II, laid off, and ultimately forced to resign as a result of his employer's discrimination policies. Other acts of alleged discrimination included a requirement that plaintiff obtain an Ohio driver's license and Ohio license plates, a limitation on the number of graduate hours he could take, and a requirement that he live in Allen County where he was employed. Plaintiff alleges that he was given the wrong address for a civil service exam and delayed in taking a second one that would qualify him for a promotion. In addition, he alleges that he was denied a position with the Lucas County Probation Department because of the unfair and bad reports made by the defendants to that agency. Finally, plaintiff alleges that because of the difficulties he encountered and the atmosphere of distrust and isolation he experienced, he found it necessary to resign.

Finding of Fact

1) At the time plaintiff was hired as Parole Officer I the requirement for the job was a bachelor's degree. The requirements for a Parole Officer II position were a baccalaureate and one (1) year of experience in parole or related work. The latter requirement was sometimes waived although there were no guidelines for such a waiver. Plaintiff's Exhibit 7: Ohio Civil Service Handbook (for 1971).

2) When plaintiff was hired he had a bachelor's degree and five months experience as a substitute teacher. He had also completed several hours on his master of arts degree in rehabilitation counselling at Bowling Green State University. He was qualified for the job he was performing and was satisfying his work requirements. In September of 1971, plaintiff was laid off. The reason given for his layoff was a shortage of agency funds. However, James Lorenzo, a white man whose experience level was slightly less than that of the plaintiff, was hired as a Parole Officer II only thirty-three days after plaintiff was fired and prior to his reinstatement.

3) The evidence shows that Defendant DeForge repeatedly referred to the plaintiff as "that black fox" and "nigger."

4) DeForge would also frequently require plaintiff to rewrite his reports although his objections were vague and no similar requirement was imposed on the other white probation officers under his supervision. Plaintiff was also limited in the number of graduate hours he could pursue outside his work despite the fact that others were not restricted in this manner. (Plaintiff's Exhibit 24 shows Webb not limited.)Although the plaintiff was criticized for living outside Allen County, the evidence shows that at least two others in the Lima office resided outside the county. Plaintiff was also excluded from several professional conferences which other workers in his office were allowed to attend.

5) Plaintiff arranged to take a civil service examination to assure his promotion to the level of Parole Officer II. The notice sent to the plaintiff specifying the time and date of the exam gave the wrong address. Another time when the plaintiff sought to take the exam he was barred from the room for one hour after it had begun. He was given no extra time and did not finish the exam. He did not pass.

6) Plaintiff applied for a job with the Lucas County Adult Probation Department in the spring of 1973. Defendant John Himmelright responded negatively to a request for a recommendation by saying the plaintiff was antagonistic and a troublemaker who displayed a poor relationship with his fellow workers and was generally hard to get along with. A subsequent investigation by J.D. Rietzke of that Lucas County agency revealed that the defendant's comments were racially motivated and false. In fact, two of plaintiff's co-workers as well as his regional supervisor in the state office gave him outstanding recommendations.

The Court finds that the defendant's remarks were racially motivated and were responsible for plaintiff's failure to get this job on this occasion, although he did later work for the Lucas County Probation Department.

Conclusions of Law

1) Plaintiff makes out a prima facie case under 42 U.S.C. § 1981, by proving racially disproportionate impact or dissimilar treatment. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Long v. Ford Motor Co.,* 496 F.2d 500, 505 n. 11 (6th Cir. 1974); *Winsten v. Lear-Siegler, Inc.,* 558 F.2d 1266, 1268 (6th Cir. 1977). That is, a person alleging a § 1981 violation must first establish that his employment terms vary from those which his employer accords to similarly situated white workers. *Long, supra,* at 505. The plaintiff here has demonstrated that the unfair treatment he received on his job differed substantially from that of his co-workers. In order to rebut plaintiff's prima facie case, the defendants should have shown

by comparative evidence that the range of sanctions meted out to the plaintiff was no harsher than the treatment of white employees. *Williams v. DeKalb County,* 577 F.2d 248, 253 (5th Cir. 1978). The defendants have failed to do this.

In employment firing situations, the Court of Appeals for the Seventh Circuit has held that a plaintiff made out a prima facie case of discrimination violative of § 1981 when he showed: (a) he was a member of a racial minority; (b) he was qualified for the job he was performing; (c) he was satisfying the normal requirements of his work; (d) he was discharged; and (e) after his discharge the employer assigned white workers to the same job. *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277 (7th Cir. 1977). Since a white man was hired to do plaintiff's job at a higher salary shortly after plaintiff was laid off, plaintiff again makes out a prima facie case.

For the foregoing reasons,

IT IS ORDERED that plaintiff should and does prevail in his action under 42 U.S.C. § 1981.

IT IS FURTHER ORDERED that the damages await determination until appropriate affidavits and materials have been submitted for the Court's consideration.

/s/ NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Toledo, Ohio

August 12, 1980.

In conformity with rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on:
August 12, 1980 James S. Gallas, Clerk

Supreme Court, U.S.
FILED
DEC 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

Case No. 86-820

In The

Supreme Court of the United States

October Term, 1986

JOHN HIMMILRIGHT,

Petitioner,

-v-

CURTIS FOULKS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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Case No. 86-820

—o—

In The

Supreme Court of the United States

October Term, 1986

—o—

JOHN HIMMILRIGHT,

Petitioner,

-v-

CURTIS FOULKS, JR.,

Respondent.

—o—

BRIEF CONTRA PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—o—

To the Chief Justice and the Associate Justices
of the
Supremen Court of the United States

STATEMENT OF THE CASE

This employment discrimination case, brought pursuant to 42 U.S.C. Section 1981, was filed by Respondent, Curtis Foulks, Jr., a black citizen, against his following former employers: the Ohio Department of Rehabilitation and Correction, the Ohio Adult Parole Authority (hereinafter,"A.P.A."), administered by said Department, and various supervisory personnel of the Department and the A.P.A., specifically, for purposes of this Brief, Morris DeForge and John R. Himmilright.

The lawsuit was brought by Mr. Foulks on February 20, 1976 to redress numerous and varied violations, by his former employers, of his constitutionally guaranteed right to be free from racial discrimination in employment. The discrimination complained of encompassed the period from February 21, 1971, when Mr. Foulks was hired by the Department, A.P.A., to September 15, 1972, when he resigned from the Department, A.P.A. The evidence at trial established that his resignation was a constructive discharge.

This case was tried to the United States District Court for the Northern District of Ohio, Western Division, and upon conclusion of a four-day trial, and the submission of an additional deposition, the District Court rendered judgment in favor of Respondent on August 12, 1980 on the issue of liability under 42 U.S.C. Section 1981. Neither DeForge nor Himmilright testified at trial.

The District Court's "tentative" finding, referred to on pages 3-4 of Petitioner's Brief, was mentioned by the Court prior to the taking of the aforementioned deposition.

Subsequent thereto, on April 27, 1981, the District Court awarded Mr. Foulks damages in the amount of $4,558.70 and attorney fees, pursuant to 42 U.S.C. Section 1988. The District Court awarded the damages and attorney fees against then-defendants, Department, A.P.A. and against the subsequently deceased Morris DeForge, individually and as Unit Supervisor, Parole Supervision Section and John R. Himmilright, individually and as Unit Supervisor, Probation Development Section. The damages and attorney fees were awarded against the three defendants, jointly and severally.

The case was appealed by said defendants to the Sixth Circuit Court of Appeals on August 4, 1983. In a split decision, the Court of Appeals held, inter alia, that the Eleventh Amendment barred recovery from the Department, A.P.A. The Court of Appeals further held that the District Court's findings of fact and conclusions of law failed to provide a sufficient basis for review of the judgment after elimination of the state defendant through sovereign immunity.

Finding that the District Court apparently did not hold DeForge and Himmilright individually responsible for *all* the disparate treatment that Mr. Foulks experienced during his employment with the Department, A.P.A., the case was remanded by the Court of Appeals for a specific finding of the basis of relief against the two remaining parties, DeForge and Himmilright, and the amount of damages, if any , suffered by reason of the acts of each. *Foulks v. Ohio Department of Rehab. & Correction*, 713 F.2d 1229 (6th Cir. 1983); cf *id.*, at 1234 (Keith, J., dissenting).

At this juncture, having reference to Judge Keith's dissenting opinion, *id.*, Respondent takes great exception to

Petitioner's present characterization of the facts as they relate to the use of racial slurs by Respondent's former employers and as they relate, chronologically and factually, to Himmilright's racially motivated interference with Respondent's attempts to secure employment with the Lucas County, Ohio Probation Department.

The evidence established at trial, reiterated by Judge Keith, was as follows:

> "Section 1981 also forbids the degradation of individuals because of their race. In addition to denying Mr. Foulks' request to attend training seminars, the defendants created an atmosphere charged with racial tension. DeForge openly discussed his lack of confidence in Mr. Foulks' work, and expressed his belief that Black people are liars and cannot be trusted. His disdain for the race further resounds in his use of the word "Nigger" and his reference to Mr. Foulks as a "Black Fox" and a "Black Gable." In the midst of this racially charged atmosphere, DeForge allegedly told Mr. Foulks, "My daughter was raped by a Black man, and I know how you feel."
>
> Moreover, Mr. Foulks' professional advancement was greatly hindered by the manifestations of the defendants' prejudice. Mr. Foulks testified that his professional activities were largely circumscribed by DeForge's efforts to minimize his contact with White counterparts. After continuously being denied promotions, Mr. Foulks sought employment elsewhere. His efforts in this regard were effectively thwarted when Mr. Himmilright responded negatively to a request for a recom-

> mendation. According to Mr. Himmilright, Mr. Foulks was antagonistic and a troublemaker who displayed a poor relationship with his fellow workers and was generally hard to get along with. As the court below correctly noted, a subsequent investigation revealed that the comments were false and racially motivated. In fact, Mr. Foulks had received several outstanding recommendations including one from his regional supervisor in the state office." *Foulks v. Ohio Dept. of Rehab. & Correction*, 713 F.3d 1229, 1235-1236 (6th Cir. 1983) (Keith, J. dissenting).

Pursuant to the Sixth Circuit Court of Appeals' instructions on remand, the District Court, in conjunction with its Opinion of August 12, 1980, set forth findings of fact and conclusions of law as pertained solely to DeForge and Himmilright.

Upon remand, the District Court, having had the benefit of hearing all of the testimony, considering the credibility of the witnesses and considering the exhibits presented during a four-day trial and, the District Court, having considered the issues on remand presented in the form of briefs arguing summary judgment, again rendered judgment in favor of Respondent on August 8, 1985.

Based solely on the District Court's finding of DeForge and Himmilright's racial discrimination toward Mr. Foulks, the District Court awarded damages against DeForge and Himmilright and attorney fees, ordered to be paid by the A.P.A.

In a unanimous decision, filed on August 11, 1986, the Sixth Circuit Court of Appeals affirmed the judgment

against both individual defendants, DeForge and Himmilright, and reversed the judgment for attorney fees against the A.P.A.

REASONS FOR DENYING THE WRIT

I. THE CREDIBILITY OF WITNESSES, WEIGHT AND SUFFICIENCY OF EVIDENCE, ARE INSUFFICIENT QUESTIONS TO WARRANT THE GRANTING OF CERTIORARI.

The Petitioner does not seriously contend that this case involves any important question in construction of a federal statute nor, for that matter, that this case involves a failure by the Sixth Circuit Court of Appeals to follow the correct standards for appellate review.

Unquestionably, the Court of Appeals rendered its decision on the basis of the "clearly erroneous" standard set forth by this Court in the case of *United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L.Ed. 746, 68 S.Ct. 525 (1948).

The Court of Appeals, in its decision of August 11, 1986, specifically found that as to the issues of liability and damages, the trial court's findings of fact were, "not clearly erroneous".

The Sixth Circuit has consistently adhered to the "clearly erroneous" standard. See, e.g., *Hayes v. Memphis Police Dept.*, 634 F.2d 350 (6th Cir. 1980).

In the *Hayes* case, the Sixth Circuit Court of Appeals adhered strictly to the "clearly erroneous" standard. This

application of the standard is supported by the case of *Stanley v. Henderson,* 597 F.2d 651 (8th Cir. 1979). In the *Stanley* case, the Eighth Circuit Court of Appeals set forth the basis for strict application of the "clearly erroneous" standard:

> "This case was based almost entirely upon sharply conflicting oral testimony. As such, the issue was primarily one of the credibility of witnesses. As we recently reiterated in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman,* 593 F.2d 129 at 131-132 (8th Cir. 1979):
>
> 'It is not the function of an appellate court to try the case *de novo,* or to pass upon the credibility of witnesses or the weight to be given their testimony...' *Shull v. Dain, Kalman & Quail, Inc.,* 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed. 2d 792 (1978). This is especially true where the case is primarily based upon oral testimony and where the trial judge has had an opportunity to view the demeanor and credibility of the witnesses. *E.g., Snodgrass v. Nelson,* 503 F.2d 94, 96 (8th Cir. 1974).' *Stanley v. Henderson,* 597 F.2d 651, 653 (8th Cir. 1979)."

Moreover, Petitioner's reliance on Rule 52(a) of the Federal Rules of Civil Procedure is misguided. Rule 52(a), in pertinent part, states as follows:

> "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The petition for a Writ of Certiorari states that the petitioner is John Himmilright, a former probation officer employed by the Ohio Adult Parole Authority.

Himmilright did not testify at trial regarding his role in this matter. Others did. Even Petitioner, at page 9 of the Petition, lamely concedes that Respondent showed that Himmilright made negative comments to the Lucas County Probation Department. Petitioner is absolutely incorrect, however, in his assertion that Respondent was hired "within days" of such comments.

The evidence against Himmilright at trial, both oral and documentary, far exceeded Himmilright's present concession of course and the trial court took the opportunity to judge the credibility of the witnesses and the documentary evidence.

The parties to this proceeding having been identified, it is only the evidence regarding Petitioner Himmilright that may properly be sought to be put before this Court by him. He has no standing to do otherwise. As to granting his request for certiorari, this Court has addressed Himmilright's situation:

> "...It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.* 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S. Ct. 422 (1923), cited in *Rice*

v. *Sioux City Cemetary;* 349 U.S. 70, 79, 99 L.Ed. 897, 904, 75 S. Ct. 614 (1954).

This case is not the sort of case described above. Nor, as Petitioner suggests, is the Sixth Circuit Court of Appeals' decision of August 11, 1986 in conflict with the decisions of this Court cited in the Petition, as to the law. Petitioner has merely substituted factual arguments for legal agruments.

II. QUESTIONS OF PRECLUSION AND THE EXISTENCE OF A CASE OR CONTROVERSY WERE NOT RAISED BELOW.

Petitioner has asked this Court to issue a writ of certiorari to review the Sixth Circuit Court of Appeals' decision of August 11, 1986.

No issues of preclusion or the existence of a case or controversy were raised by Petitioner in the Court of Appeals and consequently, that Court did not address such issues in its decision of August 11, 1986.

Moreover, as previously stated, Himmilright has no standing to argue case or controversy as set forth in the Petition. Accordingly, questions of preclusion and case or controversy are not open in this proceeding. *Ellis* v. *Dixon*, 349 U.S. 458, 99 L.Ed. 1231, 75 S. Ct. 850 (1955), rehearing den., 350 U.S. 855, 100 L.Ed. 759, 76 S. Ct. 37 (1955).

CONCLUSION

For the reasons set forth above, this Court should not grant certiorari.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief in Opposition have been served upon Petitioner, John Himmilright by forwarding such copies to his counsel, Allen P. Adler, State Office Tower, 30 E. Broad Street, 26th Floor, Columbus, Ohio 43266-0410, by United States Mail, postpaid this _____ day of December, 1986. I further certify that all parties required to be served have been served.

GEOFFREY H. DAVIS
Attorney for Respondent